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# WIND'S HOWLING: APPLYING THE CALIFORNIA TALENT AGENCIES ACT TO ESPORTS ORGANIZATIONS TO ADDRESS EVOLVING DISPARITIES

*Connor Sletten\**

## I. INTRODUCTION

Esports has leveled up. As a seemingly limitless new frontier for business, entertainment, and competition, esports has quickly grown into a global phenomenon. Esports viewership has grown exponentially over the years, from approximately 281 million viewers in 2016<sup>1</sup> to around 496 million by February 2020; by 2023, viewership is projected to grow to around 646 million.<sup>2</sup> Meanwhile, Twitch, the largest online streaming platform used by gamers, averaged over 2 million live concurrent viewers at any given time in 2020, up from approximately 1.26 million average concurrent viewers in 2019.<sup>3</sup>

While the popularity of esports depends in part on the players and in part on the professional teams they join, the players are young, often foreign, and rarely have lawyers to represent their interests.<sup>4</sup>

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\* J.D. Candidate, May 2021, Loyola Law School, Los Angeles; B.A. History, University of California, Los Angeles, September 2012. A special thanks to Professor Robert Brain for his guidance throughout the writing process and for consistently making law school a better experience for students like me. Thank you to my wife, Jamie, for her endless love and support. Also, thank you to my parents, family, and friends for always believing in me and encouraging me, and to the members of the *Loyola of Los Angeles Law Review* for their tireless work.

1. Pavo Jurkić, *Esports Audience Growth and the Future*, ESPORTS INSIGHTS (Dec. 1, 2019), <https://esportsinsights.com/inside-esports/esports-audience-growth-and-the-future>.

2. *The Incredible Growth of Esports*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/growth-of-esports-stats> (last updated Nov. 2, 2020).

3. *Twitch Statistics & Charts*, TWITCHTRACKER, <https://twitchtracker.com/statistics> (last visited Apr. 11, 2021).

4. See Riad Chikhani, *League of Lawyers: Esports Is Creating a New Class of White-Collar Jobs*, VENTUREBEAT (Feb. 6, 2018, 3:30 PM), <https://venturebeat.com/2018/02/06/league-of-lawyers-esports-is-creating-a-new-class-of-white-collar-jobs/> (discussing the rise of specialized esports lawyers as a response to players “not act[ing] in a professional manner when approaching contract deals” and “often sign[ing] anything offered to them”). Perhaps this is because international esports stars sign with teams when they are as young as twelve years old; for example, in 2008, South Korean esports star Jun “TY” Tae Yang played his first professional esports match

Meanwhile, the organizations that sign them are wealthy, savvy, and represented by counsel.<sup>5</sup> Because the professional gaming industry remains largely unregulated,<sup>6</sup> there is little to stop a sophisticated and unscrupulous team from taking advantage of young and relatively unsophisticated talent through oppressive contracts where players often have to give up some or all of their ability to monetize their personal brand. Professional gamers are subject to an industry framework that presents roadblocks to collective bargaining and uniform governance due to a general patchwork of regulatory schemes, including leagues that implement their own self-governance.<sup>7</sup> For example, Riot Games, a game developer and publisher that created the incredibly popular game League of Legends, sponsors and runs its own League of Legends league and has a history of imposing significant restrictions on league participants, including non-competition agreements restricting players from competing in other professional gaming leagues.<sup>8</sup> Further, the classification of players as independent contractors, rather than employees, presents yet another obstacle to efforts at unionization or even simple uniformity of regulatory schemes that might further players' rights.<sup>9</sup>

This unfairness has revealed itself in a lawsuit that, while recently settled,<sup>10</sup> raises issues that the entire esports industry should take to

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at the age of thirteen, after signing with his team at twelve. *Average Age in Esports vs. Major Sports*, ESPN (Sept. 17, 2017), [https://www.espn.com/esports/story/\\_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl](https://www.espn.com/esports/story/_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl) (showing the average age of esports competitors as much lower across the board compared with other professional athletics).

5. See Chikhani, *supra* note 4 (“[P]layers were at risk of being taken advantage of by . . . team owners and sponsors.”); Christina Settimi, ‘Awful Business’ or the New Gold Rush? The Most Valuable Companies in Esports Are Surging, FORBES (Nov. 5, 2019, 6:00 AM), <https://www.forbes.com/sites/christinasettimi/2019/11/05/awful-business-or-the-new-gold-rush-the-most-valuable-companies-in-esports-are-surging/>.

6. See Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating Esports*, 26 U. MIAMI INT’L & COMP. L. REV. 499, 501 (2019) (noting that there is no single governing body and addressing the challenges of effective regulation); Katherine E. Hollist, Note, *Time to Be Grown-Ups About Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823 (2015) (noting various impediments to the regulation of esports and arguing that the economic magnitude of esports alone warrants regulation and offering solutions to better regulate the industry).

7. See Hollist, *supra* note 6, at 829–30.

8. *Id.*

9. *Id.* at 839.

10. Julia Alexander, *Tfue Settles Lawsuit Against Faze Clan Over ‘Oppressive’ Gaming Contract*, THE VERGE (Aug. 26, 2020, 5:08 PM), <https://www.theverge.com/2020/8/26/21403052/tfue-faze-clan-lawsuit-settled-streaming-events-competition-esports>.

heart. Esports organizations are essentially collectives of gamers that band together under one brand to roster teams in esports competitions, stream live content globally over the internet, and generally promote themselves through partnerships with brands and celebrities.<sup>11</sup> As esports as an industry has grown exponentially, so have esports organizations.<sup>12</sup> An esports organization called FaZe Clan, self-described as “the most popular esports organization in the world,” has taken advantage of the unregulated industry while operating in esports competitions, streaming and content creation, merchandise, and more.<sup>13</sup> The organization freely signs young and promising esports stars to its brand, such as popular professional gamer Turner “Tfue” Tenney, with the promise of fame and fortune, in exchange for restrictive, one-sided, and potentially unconscionable contractual obligations.<sup>14</sup>

On May 20, 2019, Tfue filed suit against FaZe Clan for signing him to an allegedly extreme and unconscionable contract.<sup>15</sup> The contract allocated significant percentages of earned revenue to FaZe Clan, limited Tfue’s freedom to contract with sponsors, required Tfue to wear certain clothing, and contained other terms that Tfue considered unconscionable.<sup>16</sup> Tfue settled the suit on undisclosed terms and dismissed the suit on August 26, 2020.<sup>17</sup>

While FaZe Clan is one of the world’s largest esports organizations, valued at \$240 million as of November 2019,<sup>18</sup> FaZe

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11. See Katherine Liu, *Introduction to Esports Organizations*, LINEUPS (July 13, 2020, 4:00 PM), <https://www.lineups.com/esports/introduction-to-esports-organizations/>.

12. See *id.* (noting that esports organizations have a “solid foothold in the world of entertainment”).

13. Callum Williams, *The Top 5 Esports Organizations in the World*, COLOSSUS BETS, <https://www.colossusbets.com/blog/top-five-esports-organizations> (last accessed Apr. 11, 2021). See generally FAZE CLAN, <https://fazeclan.com/> (last visited Apr. 11, 2021), for an overview of the organization’s scope.

14. See Noah Smith, *A Pro ‘Fortnite’ Player Is Suing His Team and the Entire Esports World Could Feel the Fallout*, WASH. POST (May 21, 2019, 9:58 PM), <https://www.washingtonpost.com/sports/2019/05/21/pro-fortnite-player-is-suing-his-team-entire-esports-world-could-feel-fallout/>. The article describes the lawsuit between gamer Turner Tenney over his lopsided contract with FaZe Clan.

15. See, e.g., Nathan Grayson, *Popular Streamer Sues FaZe Clan Over ‘Illegal’ Contract, but the Organization Says the Contract Is Fine*, KOTAKU (May 20, 2019, 4:45 PM), <https://kotaku.com/popular-streamer-sues-faze-clan-over-illegal-contract-1834898839>.

16. Complaint, *Tenney v. FaZe Clan Inc.*, No. 19STCV17341 (Cal. Super. Ct. May 20, 2019) [hereinafter *Complaint*].

17. Alexander, *supra* note 10.

18. Settimi, *supra* note 5.

Clan's owner himself admitted that the contract terms given to Tfuе were "trash"—which "[n]obody ever disagreed with"—in May 2019.<sup>19</sup> As esports has realized a massive growth in popularity, professional gamers like Tfuе are fighting for stronger protections, recognizing that they are the driving force behind esports organizations' profits.

Tfuе raised a novel argument in his suit, which spotlights an issue that should make esports organizations second-guess the extent to which they desire control over their contract stars' professional lives. Tfuе alleged that FaZe Clan acted to procure work for him in violation of the California Talent Agencies Act (TAA), section 1700 *et seq.* of the California Labor Code.<sup>20</sup> The TAA was "designed to protect artists against iniquitous or overreaching conduct by certain personal representatives"<sup>21</sup> by forcing those who procure employment for artists in California to obtain a license from the California Labor Commissioner (CLC).<sup>22</sup> The CLC has the power to void entire contracts between artists and their unlicensed representatives who procure work for them.<sup>23</sup> Had Tfuе prevailed on his claim, any esports organization that procures business deals for its contract stars as artists would fall under the scope of the TAA, subjecting each gamer's contract to necessary approvals from the CLC. While Tfuе and FaZe Clan have settled the dispute, a lack of judgment on the merits leaves the important question of whether, and how, the TAA applies to professional gamers open and unresolved. This issue would be one of first impression for the CLC; thus, entire contracts between players and organizations that are not properly licensed under the TAA, such as FaZe Clan, could still potentially be voided if organizations are careless in their dealings with gamers.

This Note will explore the legal landscape and structure of both the TAA and the professional gaming industry. Importantly, the TAA protects "artists," which arguably includes professional gamers. Thus,

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19. TheBlast Staff, *FaZe Clan Owner Banks Admits Tfuе's 'Contract Was Trash' in War with Pro Gamer*, BLAST, <https://theblast.com/faze-clan-banks-admits-contract-trash-tfuе-esports/> (last updated June 11, 2019, 10:56 PM).

20. Complaint, *supra* note 16, at 3.

21. James M. O'Brien III, Comment, *Regulations of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CALIF. L. REV. 471, 473 (1992).

22. CAL. LAB. CODE § 1700 *et seq.* (West, Westlaw through Ch. 9 of 2021 Reg. Sess.).

23. See, e.g., *Styne v. Stevens*, 26 P.3d 343, 346 (Cal. 2001) (holding that contracts with unlicensed agents are "illegal and void ab initio").

this Note includes an examination of professional gamers both within competitive esports, who play as athletes in tournaments, and also within the online streaming space, where gamers stream video of themselves playing videogames through online platforms for the entertainment of viewers watching from home. These two realms serve an important distinction when applying the TAA to professional gamers, though they often overlap with each other. Tfue, FaZe Clan, their relationship, and the now-settled lawsuit will serve as the lens through which this Note reaches its ultimate conclusion: many professional gamers, like Tfue, do qualify as artists under the TAA. Thus, to the extent any esports organization without an agency license, like FaZe Clan, procures work for their contract players in California outside of professional team business such as tournaments, it acts as an unlicensed agency in violation of the TAA.

## II. ESPORTS, CALIFORNIA’S TALENT AGENCIES ACT, AND THE LAWSUIT

### *a. The Big Picture: A Top-Heavy, Unregulated Industry*

Professional esports athletes and online game streamers grapple with a power imbalance and general lack of regulatory framework within the esports industry, which opens the door for the sort of imbalanced power dynamic that drives a player like Tfue to sign a contract with an organization like FaZe Clan.

The professional gaming industry is unique when compared to more traditional forms of entertainment, like film, television, music, and sports. A professional gamer has myriad revenue sources to profit from, primarily streaming, sponsorships, team salaries, and esports tournaments.<sup>24</sup> These revenue sources, however, are fundamentally controlled by the IP owners; game developers and publishers (hereinafter “Publishers”) hold the intellectual property rights to the games that professional gamers compete and stream in, giving these Publishers a significant amount of leeway in how they can control

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24. See, e.g., *How Do Professional Gamers Make Money*, TEKNOS, <https://www.teknosassociates.com/how-do-professional-gamers-make-money/> (last visited Apr. 11, 2021); Brian O’Connell, *How Much Do Esports Players Make?*, THESTREET (Feb. 12, 2020, 9:43 AM), <https://www.thestreet.com/personal-finance/how-much-do-esports-players-make-15126931>. This is not an exhaustive list.

leagues, streaming platforms, and players.<sup>25</sup> The rights to play games professionally or stream online for entertainment are thus controlled by Publishers.<sup>26</sup> Professional gamers who exploit the Publishers' IP through the various sources briefly enumerated above have the opportunity to earn significant payouts. Tournaments, for example, have seen prize pools that reach upwards of \$30 million.<sup>27</sup> When a player signs with an esports organization like FaZe Clan, as detailed further below, that organization may sign them to a contract that enables the player to leverage the brand and grow their<sup>28</sup> fame and fortune<sup>29</sup> in exchange for a (not insignificant) cut of not only those tournament winnings, but also every other revenue stream the player earns from.<sup>30</sup>

#### i. Online Streaming: Publisher Control with Lucrative Opportunities

In the online streaming world, where gamers create videos of themselves playing the game and then stream it live for their viewers, Publishers generally allow such gamers ("Streamers") to profit by exploiting their IP through the use of online streaming platforms like Twitch; Streamers earn money through subscriptions and donations from their viewers, as well as through partnerships with streaming platforms themselves.<sup>31</sup> Publishers also recognize that popular

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25. *Copyright in Esports: A Top-Heavy Power Structure, but Is It Legally Sound?*, DLA PIPER (Sept. 27, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/09/ipt-news-q3-2018/copyright-in-esports/>.

26. *Id.*

27. Mike Stubbs, *The International 10 'Dota 2' Tournament Prize Pool Breaks \$30 Million*, FORBES (July 27, 2020, 4:05 AM), <https://www.forbes.com/sites/mikestubbs/2020/07/27/the-international-10-dota-2-tournament-prize-pool-breaks-30-million/>.

28. This Note intentionally uses the singular pronoun "they/them." While the singular "they" has traditionally been discouraged in legal writing, legal writers are increasingly using the singular "they" because of its usefulness and necessity. Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMMUN & RHETORIC: JALWD 61, 61–62 (2020) (discussing the increased clarity and respect that a singular "they" pronoun conveys); Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 895, 961–63 (2019) (discussing possible objections to requiring non-binary pronouns, including potential grammar-based objections).

29. See *Tfue*, TWITCHTRACKER, <https://twitchtracker.com/tfue/statistics> (last visited Apr. 11, 2021). As discussed *infra* in Section II.b, Tfue's fame skyrocketed after signing with FaZe Clan.

30. See generally TheBlast Staff, *'Fortnite' Gamer Tfue's Contract with FaZe Clan Finally Revealed!*, THEBLAST (June 11, 2019, 10:56 PM), <https://theblast.com/esports-gamer-tfue-faze-clan-contract-revealed/> (discussing Tfue's contractual relinquishment to FaZe Clan of high percentages of his earnings).

31. *Id.*; *How Do Twitch Streamers Make Money?*, MEDIKIX, <https://mediakix.com/blog/how-do-twitch-streamers-make-money/> (last visited Apr. 11, 2021).

Streamers bring revenue to the business, and have created programs to help them share in certain in-game purchases, including purchases surrounding user-generated content. For example, affiliate programs such as Epic Games' "Support-A-Creator Program" allow the Streamers to take a share of in-game purchases in games like Fortnite, one of the most popular streaming games,<sup>32</sup> when fans enter a "Creator Code" at checkout that is linked to the Streamer's account.<sup>33</sup> When a player makes a purchase in Fortnite with a linked Creator Code, the Streamer associated with that Creator Code will get a cut of the sale.<sup>34</sup> Further, once Streamers get popular enough, they can generate revenue through sponsorship deals encompassing the creation of sponsored streams, the sale of sponsored merchandise, and more.<sup>35</sup> Capitalizing on this popularity, Streamers can also sign high-profile exclusivity deals with one of the various streaming platforms; illustrative of just how lucrative these can be, prolific streamer Ninja was allegedly paid between \$20 million and \$30 million to leave Twitch in favor of Microsoft's Mixer in 2019.<sup>36</sup> Ninja has since returned exclusively to Twitch on undisclosed terms, though an undoubtedly large sum of money was involved.<sup>37</sup> Often, individuals might choose to sign with a professional esports organization, like FaZe Clan, to help maximize fame, exposure, and profit; in return, the player relinquishes a share of their earnings to the organization.<sup>38</sup>

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32. *The Most Watched Games on Twitch, March 2021*, TWITCHMETRICS, <https://www.twitchmetrics.net/games/viewership> (last visited Apr. 11, 2021). In March 2021, Fortnite was the fourth most watched game on Twitch, with over 101.4 million hours of streamed content watched.

33. *Support-A-Creator Program*, EPIC GAMES, <https://www.epicgames.com/affiliate/en-US/overview#eligible> (last visited Apr. 11, 2021).

34. *Id.* Streamers will get a minimum of 5% of in-game sales if they are eligible for the Support-A-Creator program. *Id.*

35. *How Do Twitch Streamers Make Money?*, *supra* note 31.

36. Ben Gilbert, *Ninja Reportedly Got Paid Between \$20 Million and \$30 Million by Microsoft to Leave Amazon's Twitch Streaming Service*, BUS. INSIDER (Jan. 27, 2020, 11:57 AM), <https://www.businessinsider.com/how-much-did-ninja-make-for-leaving-twitch-2020-1>.

37. See Nathan Grayson, *Ninja Is Back Exclusively on Twitch*, KOTAKU (Sept. 10, 2020, 12:25 PM), <https://kotaku.com/ninja-is-exclusively-back-on-twitch-1845013346>.

38. These organizations are discussed in greater detail later in this Note. See TheBlast Staff, *supra* note 30 (discussing Tfue's contractual relinquishment to FaZe Clan of high percentages of his earnings).

ii. Esports Leagues: Publisher Control with Competitive Allure

Meanwhile, esports leagues are either owned directly by Publishers or run by third parties that license Publishers' IP.<sup>39</sup> Esports leagues, akin to more traditional sports leagues, are generally dedicated to competitive play between esports gamers (hereinafter "Athletes") in a tournament-style environment. Professional gamers, as esports athletes,

compete directly against other competitors in one-on-one events (like [real world] tennis); others play in team events where teammates assume different roles and work cooperatively to score points against other teams (like basketball); and still others compete by allowing each competitor to take a turn and then compare their ultimate times/scores (like Olympic skiing or gymnastics).<sup>40</sup>

Leagues vary significantly. Some are dedicated solely to one game and are Publisher-owned, like Activision Blizzard's Overwatch League or Call of Duty League.<sup>41</sup> Others are dedicated to multiple games and owned by third parties.<sup>42</sup> For example, ESL (formerly Electronic Sports League<sup>43</sup>), the world's largest esports company, acts as a host for branded tournaments and international gaming world championships.<sup>44</sup> ESL has some 242 million fans globally and has operated for over 20 years.<sup>45</sup>

Further, some leagues are beginning to model themselves in a manner that parallels traditional professional sports leagues by having permanent regional teams intended to provide "something new to e-

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39. Cecilia D'Anastasio, *Esports Pros Have 'Dream' Jobs—but Game Publishers Have All the Power*, WIRED (Sept. 10, 2020, 1:30 PM), <https://www.wired.com/story/esports-pros-labor-game-publishers-power/>; *Copyright in Esports*, *supra* note 25.

40. Hollist, *supra* note 6, at 826.

41. See D'Anastasio, *supra* note 39.

42. See Harry Alford, *The 2017 Esports Ecosystem Explained in One Chart*, MEDIUM (Oct. 2, 2017), <https://medium.com/humble-ventures/the-2017-esports-ecosystem-explained-in-one-chart-ef6fc48b779e>; Andrew Webster, *Why Competitive Gaming Is Starting to Look a Lot Like Professional Sports*, THE VERGE (July 27, 2018, 10:00 AM), <https://www.theverge.com/2018/7/27/17616532/overwatch-league-of-legends-nba-nfl-esports>.

43. *Our Story*, ESL GAMING GMBH, <https://about.eslgaming.com/history/> (last visited Apr. 11, 2021).

44. *About Us*, ESL GAMING GMBH, <https://about.eslgaming.com/> (last visited Apr. 11, 2021).

45. *Id.*; *Feature Interview: ESL Is the World's Largest Esports Company*, BUGG REPORT (Apr. 24, 2019), <https://www.bugreport.com.au/feature-interview-esl-is-the-worlds-largest-esports-company/>.

sports: stability.”<sup>46</sup> Activision Blizzard’s Overwatch League, for example, has twenty city-based teams with a 280-match regular season, and even has an all-star tournament and playoffs.<sup>47</sup> Additionally, the NBA has partnered with Publisher Take-Two to launch the NBA 2K League and held its first draft in April 2018 with “all of the pomp and circumstance normally reserved for players on the court.”<sup>48</sup> The inaugural live draft in 2018 was attended by NBA Commissioner Adam Silver, who announced the picks, and just like the actual NBA draft, it had a podium with dynamic backdrop, a live audience, and expert commentators.<sup>49</sup> It was broadcast live on NBA TV and Twitch, and NBA team owners like Mark Cuban called the players personally to deliver the selection news to their draft picks.<sup>50</sup>

Regulation of esports leagues is a major issue that both the leagues themselves and the players grapple with. Unlike traditional professional sports leagues, there are no formal collective bargaining organizations or governing regulatory bodies to set guidelines for pay, player benefits, or IP rights.<sup>51</sup> While some efforts at unionization are underway, leagues or teams are in complete control of player salaries and even player conduct policies.<sup>52</sup> Riot Games, for example, established the League of Legends Champions Series (LCS) Players’ Association in 2017, stating “[i]t is important . . . that the players have a voice.”<sup>53</sup> But as the LCS Players’ Association is run and funded by the Publisher, it “has led some to question its motives”; further, it is not actually a true union in the sense that traditional players’ associations are in leagues like the NBA and MLB because it was

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46. Webster, *supra* note 42.

47. *What Is the Overwatch League*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/about> (last visited Apr. 11, 2021).

48. AJ Willingham, *What Is Esports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html>.

49. Tim Bontemps, *With 2K League Draft Mirroring Actual NBA Draft, Pro League Shows It’s Serious About Esports*, WASH. POST (Apr. 4, 2018, 2:09 PM), <https://www.washingtonpost.com/news/sports/wp/2018/04/04/with-2k-league-draft-mirroring-actual-nba-draft-pro-league-shows-its-serious-about-esports/>.

50. *Id.*

51. See Uriah Tagle, *As North American Esports Levels Up, Its Players Lag Behind*, 19 TEX. REV. ENT. & SPORTS L. 81, 81 (2019).

52. *Id.* at 81–87.

53. See Kieran Darcy, *Riot’s Players’ Association Lays Groundwork for Unionization*, ESPN (June 12, 2017), [https://www.espn.com/esports/story/\\_/id/19617991/riot-players-association-lays-groundwork-unionization](https://www.espn.com/esports/story/_/id/19617991/riot-players-association-lays-groundwork-unionization).

founded by, and remains controlled by, the Publisher.<sup>54</sup> To some, this seems instead to be Riot's attempt to "assert control over the players through [the association] if they're the primary or only funding source."<sup>55</sup> To illustrate Riot's centralized control over the league: "as both the league organizer and the game developer, Riot Games can ban a player from participation in a league and even from the game entirely."<sup>56</sup>

The IP owner's unilateral power represents a significant level of centralized control over competitive athletic esports events. Additionally, where the majority of consumption happens over the internet, sale of streaming rights online often results in, as one commentator has described it, "imbalanced profit sharing between the league, the teams, and the remaining esports market participants."<sup>57</sup> Some organizations, such as the Esports Integrity Coalition (ESIC) have tried to establish a regulatory framework to prevent match-fixing, cheating, and doping.<sup>58</sup> Others, like the World Esports Association (WESA) have attempted to set a greater standard for player rights and esports policy, including general league rules and guidelines covering player transfers; the ESL pro league for the game Counter-Strike: Global Offensive is a member of WESA.<sup>59</sup> Other attempts at establishing a formalized governing body have seen mixed results, but ultimately the crowded landscape of competing regulatory bodies fails to win the legitimacy necessary for teams and leagues to follow one uniform and universal set of rules.<sup>60</sup>

### iii. Player Organizations: Power in Numbers, but Beware Overreaching

Amidst the leagues and the players lie the player organizations (hereinafter "POs"), like FaZe Clan, who might field one team in one league, or multiple teams in multiple leagues, and often also maintain an entertainment arm dedicated to online streaming, all housed under

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54. *Id.*

55. *Id.* (alteration in original).

56. Laura L. Chao, Note, "You Must Construct Additional Pylons": Building a Better Framework for Esports Governance, 86 *FORDHAM L. REV.* 737, 756 (2017).

57. *Id.* at 755.

58. Martinelli, *supra* note 6, at 506.

59. *Id.* at 507.

60. *Id.* at 509–10.

one banner in order to profit as a brand.<sup>61</sup> While these POs vary in size, scope, and fame,<sup>62</sup> the most prolific POs have made massive strides in popularity, effectively “blend[ing] lifestyle and gaming.”<sup>63</sup> These organizations branch out in a multitude of ways, such as celebrity endorsements, in a constant grind for a larger fanbase. One such relationship occurred when FaZe Clan member, FaZe Temperr, paired with young basketball superstar Ben Simmons for the first digital cover of SLAM magazine in February 2020.<sup>64</sup>

Esports POs take on sponsorships, advertising deals, and merchandising in order to bring in revenue.<sup>65</sup> The PO might also take on outside investors, including venture capital firms and individuals—for example, popular esports organization 100 Thieves has taken on multiple rounds of investments, including investments from famous rapper Drake,<sup>66</sup> as well as \$35 million of Series B funding in July 2019.<sup>67</sup> Part of the attraction of 100 Thieves to outside investors is the effective characterization of the brand beyond esports, as a “lifestyle brand[]” that has had multiple “apparel drops” sell out “in less than 20 minutes.”<sup>68</sup> Likewise, Team Envy, a large Texas-based esports organization, recently added rapper Post Malone to its ownership group.<sup>69</sup> Consequently, to a prolific streamer who is able to build up a significant personal following, joining a powerhouse PO brand that

61. For example, Team Liquid, one of the other largest esports organizations along with FaZe Clan, has raked in over \$36 million in prize money as of April 2021 in 1,926 tournaments alone. *Team Rankings*, ESPORTS EARNINGS, <https://www.esportsearnings.com/teams> (last visited Apr. 11, 2021).

62. See, e.g., *The World’s Greatest Esports Teams*, RANKER, [https://www.ranker.com/list/best-esports-teams/ranker-games?ref=also\\_ranked&pos=1&a=0&l=85373584&lttype=n&g=0](https://www.ranker.com/list/best-esports-teams/ranker-games?ref=also_ranked&pos=1&a=0&l=85373584&lttype=n&g=0) (last updated Sept. 1, 2020) (ranking the top esports teams).

63. See, e.g., Franklyn Calle, *Ben Simmons and FaZe Temperr Featured on First Digital Cover of Slam*, SLAM (Feb. 10, 2020), <https://www.slamonline.com/esports/ben-simmons-and-faze-temperr-slam/>.

64. See *id.* FaZe Temperr and Ben Simmons also played Call of Duty together for the piece.

65. Mitch Reames, *How Esports Organizations Make Money*, HOTSPAWN (May 8, 2019, 2:32 PM), <https://www.hotspawn.com/guides/how-esports-organizations-make-money/>.

66. Matt Perez, *Drake and Scooter Braun Invest in Esports Company 100 Thieves*, FORBES (Oct. 23, 2018, 9:00 AM), <https://www.forbes.com/sites/mattperez/2018/10/23/drake-and-scooter-braun-invest-in-esports-company-100-thieves/>.

67. See Alex Wilhelm, *A Snapshot of Venture and Startup Activity in Esports*, CRUNCHBASE (Nov. 15, 2019), <https://news.crunchbase.com/news/a-snapshot-of-venture-and-startup-activity-in-esports>.

68. Perez, *supra* note 66.

69. *O’Melveny Advises Envy Gaming as It Adds Post Malone to Ownership Group*, O’MELVENY (Sept. 2, 2020), <https://www.omm.com/our-firm/media-center/press-releases/omelveny-advises-envy-gaming-as-it-adds-post-malone-to-ownership-group>.

branches out far beyond any particular video game has proven a compelling option,<sup>70</sup> allowing both the individual and the PO to benefit.

A typical player-signee might look familiar to those who follow more traditional sports. Sought-after esports players may be considered “free agents” before signing with a PO; their place on a team may be subject to league approval, and the league might have minimum required salaries.<sup>71</sup> Riot Games, for example, has significant control over minimum player salaries, contract approval, and even designates a free agency period in its League of Legends professional league.<sup>72</sup> Teams can trade pieces of their rosters with one another, and owners can even purchase entire rosters to buy into a league.<sup>73</sup> Ultimately, given the top-heavy power structure, the lack of collective bargaining, and the lack of any regulatory body ensuring strong players’ rights, it is of little surprise that a talented young gamer would turn to an organization like FaZe Clan to fill in gaps, secure gainful employment, and bring one’s brand into global recognition.

A PO that builds a bridge between the professional gamer and fame may act as a both a boon and a curse. Where the clout of an established brand can bring an instant boost to popularity, it can also present a disparity in bargaining position that allows an organization to take advantage of the unsophisticated young gamer. Because hopes of a “pan-esports governing body”<sup>74</sup> are, at best, in their infancy, Tfue’s lawsuit against FaZe Clan exposes one potential bulwark against exploitation of the professional gamer in already-existing law with the TAA; thus, the balance of power in esports may finally begin to tip in the individual professional gamer’s favor.

### *b. The Game in Focus: FaZe Clan and Tfue*

Tfue is a professional gamer who is no stranger to controversy. Hailing from Indian Rocks, Florida, the 23-year-old gamer began

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70. See Perez, *supra* note 66 (100 Thieves’ founder, Matthew “Nadeshot” Haag, has millions of followers personally, but wants to use the 100 Thieves name to “enable his players to do the same for themselves.”).

71. See Graham Ashton, *How the Esports Player Transfer Market Differs from Soccer or the NBA*, ESPORTS OBSERVER (Jan. 6, 2020), <https://esportsobserver.com/esports-player-transfers-2020/>.

72. *Id.*

73. *Id.*

74. See Chao, *supra* note 56, at 761.

making waves in the game Fortnite in 2018, where he quickly became recognized as one of the best players in the world.<sup>75</sup> While he also streamed games such as Call of Duty and H1Z1, his initial popularity rose from the ashes of his unwitting competitors in Fortnite.<sup>76</sup> On April 30, 2018, Tfuue officially became a member of FaZe Clan, signing to compete with its team FaZe Fortnite and more generally become part of the team's various business arms.<sup>77</sup> In due time, Tfuue's fandom exploded. He went from 148,609 Twitch followers on April 30, 2018, to over 1 million Twitch followers by the end of June, 2018; as of March 31, 2021, he had 10.2 million Twitch followers, and streamed 9,080 hours of gameplay on the platform in total.<sup>78</sup> He has the second most Twitch followers in the world, still far off from prolific gamer Ninja's 16.9 million followers, but an incredible achievement nonetheless for the young star.<sup>79</sup>

Tfuue's professional gaming career has been mired in controversy on more than one occasion. For example, he was temporarily banned from Twitch for saying a racial slur on one of his streams in May 2018.<sup>80</sup> Further, he was permanently banned from Epic Games for buying and selling accounts in July 2018 and banned again from Twitch for an undisclosed reason later that same month.<sup>81</sup> He even muttered yet another racial slur in September 2019, and though he avoided a Twitch ban, it stirred further outrage.<sup>82</sup>

Even though Tfuue is clearly no angel himself, there is no denying that he has become one of the biggest names in professional gaming today. He has built up an enormous following, with 5.1 million followers on Instagram and 4.1 million followers on Twitter as of

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75. Ford James, *Who is Tfuue? Everything You Need to Know About the Ex-FaZe Clan Fortnite Star*, GAMESRADAR+ (Jan. 17, 2020), <https://www.gamesradar.com/who-is-tfuue-fortnite-twitch-youtube>.

76. *Id.*

77. *Id.*; Saahil Agnelo Periwai, *Fortnite Pro Tfuue Settles Dispute with FaZe Clan*, SPORTSKEEDA (Aug. 27, 2020), <https://www.sportskeeda.com/esports/fortnite-pro-tfuue-settles-dispute-faze-clan>.

78. Tfuue, *supra* note 29.

79. *Twitch Streamers with the Most Followers*, TWITCHTRACKER, <https://twitchtracker.com/channels/most-followers> (last visited Apr. 11, 2021).

80. James, *supra* note 75.

81. *Id.*

82. *Id.*

March 31, 2021.<sup>83</sup> Further, his net worth is estimated to be \$4–6 million (though some rumors peg his streaming earnings to be in excess of \$20 million), with estimated YouTube earnings alone in excess of \$1 million per year.<sup>84</sup>

Tfue likely can credit much of his meteoric rise in popularity to his affiliation with FaZe Clan. The numbers do not lie: soon after signing with FaZe Clan, Tfue saw a steep increase in followers. On the day he signed with FaZe Clan, he had a respectable 148,609 followers on Twitch, but 6 months later he had over 3.3 million.<sup>85</sup> This undeniable correlation also begs the question of how much he may have reciprocated, for it must also be true that FaZe Clan benefitted by having one of the best Fortnite players in the world in the fold.<sup>86</sup> Ultimately, no matter the reward, Tfue’s lawsuit raises legitimate concerns that are the seemingly inevitable consequences of the unchecked growth of professional gaming, esports organizations, and professional gamers in an unregulated space.

FaZe Clan, on the other hand, began as a YouTube channel in 2010.<sup>87</sup> A few gamers named FaZe ClipZ, FaZe Resistance, and FaZe Housecat (later named Timid) became popular for their YouTube videos in which they performed “trick shots” with sniper rifles in the video game *Call of Duty: Modern Warfare 2*.<sup>88</sup> A trick shot is when the player, in order to add flair to an ordinary in-game kill, adds superfluous motion such as spinning the cursor in circles while jumping as they virtually kill their opponent.<sup>89</sup> Current co-manager,

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83. Tfue (@Tfue), INSTAGRAM, <https://www.instagram.com/tfue> (last visited Apr. 11, 2021); Tfue (@TTfue), TWITTER, <https://twitter.com/TTfue> (last visited Apr. 11, 2021).

84. Jamie Hore, *Who is Tfue? Net Worth, Earnings, Streaming Setup, and More*, THE LOADOUT, <https://www.theloadout.com/streamers/tfue/net-worth-streaming-setup> (last updated Aug. 27, 2020).

85. *Tfue*, *supra* note 29.

86. Indeed, in October 2018, just months after signing with FaZe, Tfue and then-FaZe-partner Cloakzy won a \$400,000 grand prize in a Fortnite tournament, and he won numerous other prizes while under the FaZe banner. *See FaZe Clan/Tournament Results*, GAMEPEDIA, [https://fortnite-esports.gamepedia.com/FaZe\\_Clan/Tournament\\_Results](https://fortnite-esports.gamepedia.com/FaZe_Clan/Tournament_Results) (last visited Apr. 11, 2021); *see also* James, *supra* note 75 (“Tfue has won numerous online and offline tournaments, including the Fall Skirmish event at Twitchcon 2018 and Week 3 of the World Cup North American east coast qualifiers.”).

87. Emir Mehmedćehajić, *FaZe Clan History*, PREZI (Sept. 22, 2017), <https://prezi.com/p/xg-12sipbkj3/faze-clan-history>.

88. *Id.*

89. *How to Trickshot in Call of Duty*, WIKIHOW, <https://www.wikihow.com/Trickshot-in-Call-of-Duty> (last updated Aug. 11, 2020).

FaZe Temperr, eventually came into the fold, and the team members started becoming more interactive with their followers on YouTube.<sup>90</sup> By 2011, FaZe Clan had its first esports roster and competed in Major League Gaming.<sup>91</sup> Moving beyond the Call of Duty franchise, in 2016 it acquired an international Counter Strike: Global Offensive team to expand its competitive roster.<sup>92</sup> FaZe Clan currently represents multiple professional esports rosters that span over six different gaming franchises, including Fortnite, Counter Strike: Global Offensive, Call of Duty, FIFA, Tom Clancy's Rainbow Six, and Playerunknown's Battlegrounds.<sup>93</sup> In competitive play, FaZe Clan has altogether collected nearly \$9.2 million in tournament prize money in 21 different countries.<sup>94</sup>

FaZe Clan has quickly ascended the ranks to become an immensely popular brand, sporting some notable cross-media members such as rapper Lil Yachty and Pittsburgh Steelers wide receiver JuJu Smith-Schuster.<sup>95</sup> The brand has approximately 8.61 million subscribers on YouTube,<sup>96</sup> 5.3 million followers on Twitter,<sup>97</sup> and 10.9 million followers on Instagram.<sup>98</sup> On an individual level, some FaZe Clan team members have millions of their own followers.<sup>99</sup> Beyond competitive esports, FaZe Clan has over seventy team members that stream live on Twitch; tens of thousands of viewers regularly and simultaneously watch any given team members' live-stream.<sup>100</sup> FaZe Clan rounds out the full fan experience by selling

90. Mehmedčehajić, *supra* note 87.

91. *Id.*

92. *Id.*

93. *Our Pro Teams*, FAZE CLAN, <https://fazeclan.com/pages/esports> (last visited Apr. 11, 2021).

94. *FaZe Clan*, ESPORTS EARNINGS, <https://www.esportsearnings.com/teams/240-faze-clan> (last visited Apr. 11, 2021).

95. Khal, *From Gaming to Gumball: The Rise of FaZe Clan*, COMPLEX (Aug. 21, 2018), <https://www.complex.com/pop-culture/2018/08/the-rise-of-faze-clan>.

96. FaZe Clan, YOUTUBE, <https://www.youtube.com/channel/UCNdpD9V0PIrH1glUJ6RG4-w> (last visited Apr. 11, 2021).

97. FaZe Clan (@FaZeClan), TWITTER, <https://twitter.com/fazeclan?lang=en> (last visited Apr. 11, 2021).

98. FaZe Clan (@fazeclan), INSTAGRAM, <https://www.instagram.com/fazeclan/?hl=en> (last visited Apr. 11, 2021).

99. FaZe Banks, for example, has 2.8 million followers on Instagram alone at the time of writing. Faze Banks (@banks), INSTAGRAM, <https://www.instagram.com/banks> (last visited Apr. 11, 2021).

100. FaZe, TWITCH, <https://www.twitch.tv/team/faze> (last visited Apr. 11, 2021).

branded merchandise, such as sweatshirts, hats, sandals, and jerseys.<sup>101</sup>

Fulfilling its vision of a “lifestyle brand,” FaZe Clan has extended into the entertainment space in multiple ways, including an upcoming reality show to search for its next “gaming star,”<sup>102</sup> and even participation in the Gumball 3000 Rally, where, in 2018, the team spent seven days (virtually) taking its fans with them on a journey from London to Tokyo in a Rolls Royce and a Ferrari.<sup>103</sup> Naturally, the cars were sponsored, and FaZe Clan went so far as to sell special Gumball-themed merchandise to provide the full experience.<sup>104</sup> FaZe Clan members also live together in a multi-million dollar Los Angeles mansion, where the organization allegedly pays \$80,000 per month to rent a nearly 13,000 square foot home complete with its own gym.<sup>105</sup> Thus, the PO lives up to its self-characterization as “[b]ridging the gap between gaming, content & culture since 2010.”<sup>106</sup>

FaZe Clan clearly recognizes that in order to become a truly successful brand, it cannot rest easy on tournament winnings for competitive gaming. Its brilliant and expansive marketing and brand-building has proven the viability of the professional gaming industry as more than just a game. Consequently, however, as the organization expands into a multi-faceted entertainment and lifestyle powerhouse, the consequences of short-sighted dealings are catching up with it. Tfue’s lawsuit, discussed later, has shed light on how the organization wields power over unscrupulous gamers who want the benefits of a partnership with FaZe Clan.

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101. *FaZe Clan Official Shop*, FAZE CLAN, <https://fazeclan.com/collections/store> (last visited Apr. 11, 2021); *FaZe Pro Shop*, FAZE CLAN, <https://fazeclan.com/collections/pro-shop> (last visited Apr. 11, 2021).

102. Nick Statt, *Faze Clan Is Launching a Quibi Reality Show to Sign Its Next Gaming Star*, THE VERGE (Feb. 4, 2020, 12:00 PM), <https://www.theverge.com/2020/2/4/21121975/faze-clan-quibi-reality-show-contest-gaming-e-sports>.

103. Khal, *supra* note 95.

104. *Id.*

105. *The New FaZe House Is Being Rented for \$80,000 Per Month*, FAMOUS CELEBRITY HOMES (Mar. 16, 2020), <https://www.famouscelebrityhomes.com/new-faze-house-2020>.

106. FaZe Clan, FACEBOOK, <https://www.facebook.com/TheFaZeClan> (last visited Apr. 11, 2021).

*c. The Act: What is an Artist?*

The TAA regulates the procurement of employment for “artists” as defined by the act.<sup>107</sup> An artist under the TAA includes actors and actresses, musicians, directors, composers, and more.<sup>108</sup> However, the California legislature also left the term open ended, to broadly encompass “*other* artists and persons rendering professional services in motion picture, theatrical, radio, television[,] and *other entertainment enterprises*.”<sup>109</sup> The CLC has generally taken a broad approach to the definition of who constitutes an artist; that is, leaning on the “other artists and persons” language in the act referenced above. For example, Duane “Dog” Chapman was considered an artist under the act for his contributions to the show “Dog the Bounty Hunter” in spite of his licensed profession as a bounty hunter and bail bondsman, rather than an “actor.”<sup>110</sup> Here, the CLC noted the language of the act specifically includes persons “other than actors or actresses.”<sup>111</sup> Famous boxer Ray Leonard was deemed an artist for his host position on “The Contender” as well, because his name and likeness were used to boost ratings and advertisement revenue.<sup>112</sup> In 2002, Billy Blanks, a martial artist who created TaeBo, was declared an artist under the act by the CLC because “Blanks’ fame as an athlete and creator of TaeBo[] resulted in production companies desiring to use his likeness to boost ratings, which would inevitably attract more advertisers.”<sup>113</sup> Thus, it is clear that the CLC embraces the broad language in the TAA of who qualifies as an artist. While a typical actor or actress is an obvious and usual focal point of the TAA, when one’s name or

107. CAL. LAB. CODE § 1700 *et seq.* (West, Westlaw through Ch. 9 of 2021 Reg. Sess.).

108. *Id.* § 1700.4.

109. *Id.* (emphasis added). The full statutory list includes: “actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture[,] and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television[,] and other entertainment enterprises.”

110. Determination of Controversy at 4, 11, *Chapman v. Krutonog*, No. TAC 3351 (Cal. Lab. Comm’r Oct. 31, 2012).

111. *Id.* at 11. The CLC also went on the find that “Dog” and his crew did, in fact, qualify as actors under the Act as well.

112. See Determination of Controversy at 8, *Leonard v. Rebney*, No. TAC 23-04 (Cal. Lab. Comm’r Jul. 1, 2005).

113. Determination of Controversy at 6–7, *Billy Blanks v. Jeffrey Greenfield*, No. TAC 27-00 (Cal. Lab. Comm’r Mar. 11, 2002) (emphasis omitted) (holding Greenfield operated as an unlicensed talent agency under the Act).

likeness is used to boost marketability within any medium of entertainment, that person is considered an artist under the TAA, subjecting those who procure work for that artist to the Act's statutory restrictions.

The TAA regulations further apply to a "person" procuring work for an artist, meaning individuals, companies, societies, firms, partnerships, associations, corporations, limited liability companies, managers, or their agents or employees.<sup>114</sup> If this "person" procures work for an artist, he or she is considered a "talent agency."<sup>115</sup> The TAA defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists," and further clarifies that a talent agency "may, in addition, counsel or direct artists in the development of their professional careers."<sup>116</sup> Critically, talent agencies must apply for a license from the CLC to operate as a talent agency,<sup>117</sup> whose approval then necessarily subjects licensed agencies to a number of statutory regulations, including submitting artist contracts to the CLC for approval,<sup>118</sup> posting copies of laws in the office,<sup>119</sup> and even making all books, records, and other papers available for inspection by the CLC upon request.<sup>120</sup> Additionally, the TAA regulates the conduct of the talent agency. For example, agents are prohibited from sending their clients to unsafe locations, sending a minor to a place where alcohol is furnished or consumed, or allowing persons of bad character, such as gamblers or strippers, into agency places of business.<sup>121</sup> Thus, in order to procure employment for an artist in California, the prospective "agent" must apply for and obtain an agency license, and then follow the various regulations of the TAA.

Further, California case law is clear: even if the person engages in some legal activities under a contract, public policy requires that courts "deter [unlicensed individuals] from engaging in illegal

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114. CAL. LAB. CODE § 1700.

115. *Id.* § 1700.4(a).

116. *Id.*

117. *Id.* § 1700.5.

118. *Id.* § 1700.23.

119. *Id.* § 1700.28.

120. *Id.* § 1700.27.

121. *Id.* § 1700.33–1700.35.

activities.”<sup>122</sup> Thus, an artist’s contract with an unlicensed talent agent is “illegal and void ab initio.”<sup>123</sup> While the California Supreme Court has recognized that the doctrine of severability may, under the right circumstances, apply to contracts under which illegal procurement of employment took place, application of the doctrine of severability generally remains within the sole discretion of the CLC.<sup>124</sup> Historically, the CLC has been reluctant to apply severability—“severance is never available to permit partial recovery of commissions for [] services that required no talent agency license.”<sup>125</sup> The CLC has ultimately recognized a narrow exception, applying severability where the procurement of employment is “collateral to the main objective of the contract.”<sup>126</sup> Evaluating this, the CLC relies primarily on the central purpose of the contract, and thus whether a main focus of the agreement was procuring employment for an artist unlawfully.<sup>127</sup> Courts hold the CLC’s views, “if not clearly erroneous,” are “entitled to substantial weight,”<sup>128</sup> and therefore courts generally decline to question the CLC’s authority in applying the TAA. For example, even where the TAA uses the word “occupation” in a way that may imply that an agent is only subject to the TAA “[i]f the agent’s employment procurement function constitutes a significant part of the agent’s business as a whole,”<sup>129</sup> courts have chosen to defer to the CLC: “[t]he weight of authority is that even the incidental or occasional provision of such services requires licensure.”<sup>130</sup> Therefore, if an unlicensed person procures employment even once, he or she is subject to adjudication, and a possible voiding of the contract, by the CLC.<sup>131</sup>

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122. *Yoo v. Robi*, 24 Cal. Rptr. 3d 740, 750 (2005).

123. *Styne v. Stevens*, 26 P.3d 343, 346 (Cal. 2001); *see Yoo*, 24 Cal. Rptr. 3d at 750–51; *see also Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 446–47 (1995) (finding an artist’s contract with an unlicensed talent agent to be unenforceable).

124. *See Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 750–53 (Cal. 2008).

125. *Id.* at 754.

126. Determination of Controversy at 19–21, *Yoakam v. The Fitzgerald Hartley Co.*, No. TAC 8774 (Cal. Lab. Comm’r. Jan. 11, 2010).

127. *See* Determination of Controversy at 4–5, *Kyle Bluff v. Paris Djon*, No. TAC-17277 (Cal. Lab. Comm’r Nov. 17, 2011).

128. *Marathon Ent., Inc.*, 174 P.3d at 748.

129. *Wachs v. Curry*, 16 Cal. Rptr. 496, 503 (1993).

130. *Marathon Ent., Inc.*, 174 P.3d at 748 (citing *Styne v. Stevens*, 26 P.3d 343, 349 (Cal. 2001) (alteration in original)).

131. *Id.* (discussing the issue of “occupation” and determining “we likewise conclude the Act extends to individual incidents of procurement”); *see Waisbren v. Peppercorn Prods., Inc.*, 48 Cal.

### III. THE ACT APPLIED: HOW THE TAA CAN HELP PROTECT PROFESSIONAL GAMERS

#### *a. The Gamer: Athlete, Entertainer, or Both?*

To better understand the issues in applying the TAA to gamers, it is important to recognize that there are two classes of professional gamers: (1) esports Athletes and (2) Streamers. Esports athletes are professional gamers who play competitively in esports leagues, earn salaries from their team, and hope to take a share in tournament prize winnings.<sup>132</sup> Streamers, on the other hand, are professional content-creators who live-stream video of themselves playing the games via online platforms such as Twitch.<sup>133</sup> Athletes and Streamers may seem like two sides of the same coin, but ultimately they play different roles that may distinguish them as applied to the TAA.

Professional gamers, whether Athletes or Streamers, are similar in multiple ways. Both esports Athletes and Streamers benefit significantly from sponsorship deals: data on esports revenue streams shows that over 40% of all esports revenue in 2019 came from sponsorships, totaling nearly \$457 million out of \$1.1 billion.<sup>134</sup> Further, both Athletes and Streamers are commonly part of esports POs, like FaZe Clan or 100 Thieves; these organizations recognize that “a business model specifically predicated on their success in esports competitions is not a viable long-term solution,” and thus sign popular young online Streamers to act as content-creators under the PO’s brand, in turn bringing more fans and revenue to the organization as a whole.<sup>135</sup> By signing high-profile Streamers to the PO, the organization hopes to “build a more recognizable *brand*” that will ultimately maximize profits.<sup>136</sup>

Major differences arise, however, when you look at what an Athlete and Streamer each regularly do day-to-day. While esports Athletes are training for hours upon hours every day to compete at the

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Rptr. 2d 437, 442 (1995) (discussing the CLC’s blunt rejection of the argument that purely “incidental” procurement of employment is not forbidden).

132. Josh Chapman, *Gaming—Athletes vs Entertainers*, MEDIUM (July 11, 2019), <https://medium.com/konvoy/gaming-athletes-vs-entertainers-a3118c6dc89>.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

highest level, the Streamers are engaging with fanbases and creating a persona to better market themselves and maximize viewership on a stream.<sup>137</sup> The Streamers “in the gaming ecosystem have essentially monopolized headlines and get their best gaming clips posted across almost every social platform. It’s much tougher to market a professional when they aren’t in front of a camera for 100% of their day.”<sup>138</sup> Thus, for a pure esports Athlete, it is more likely that the organization with which an Athlete is affiliated, and not the Athlete themselves, creates marketability. Further, someone who markets themselves primarily through streaming faces an incredibly demanding schedule of constant content-creation, where “[e]ven the top streamers lose tons of subscribers when only being gone for short periods of time.”<sup>139</sup> Meanwhile, an esports Athlete may see more overall stability in the brand behind the team, and thus spend more of their time practicing to become a stronger competitor rather than cultivating an ever-demanding fanbase.<sup>140</sup> For example, before his move from Twitch to a streaming platform called Mixer,<sup>141</sup> Shroud, a former professional esports Athlete who has since become a “prolific streamer,”<sup>142</sup> streamed over 7,500 hours of content between November 2016 and October 2019 on Twitch, while growing from around 745,000 followers to nearly 7.07 million followers in that 3-year span.<sup>143</sup> Meanwhile, many professional esports Athletes will focus on one single game for 12–14 hours straight per day in order to reach the apex of their abilities, meaning both the Athlete and the Streamer subject themselves to grueling schedules, though under different circumstances.<sup>144</sup> Clearly, a natural ability to excel at gaming does not necessarily make a professional esports Athlete an entertaining Streamer, nor does a prolific Streamer necessarily have the pure skill to become a professional esports Athlete. While gamers such as Tfue and Shroud have shown success in both realms, there are esports

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Ben Walker, *Shroud Is Moving to Mixer*, DOT ESPORTS (Oct. 24, 2019, 12:13 PM), <https://dotesports.com/streaming/news/shroud-is-moving-to-mixer>.

142. Chapman, *supra* note 132.

143. *Shroud: Statistics*, TWITCHTRACKER, <https://twitchtracker.com/shroud/statistics> (last visited Apr. 11, 2021).

144. Chapman, *supra* note 132.

Athletes that would not be able to garner recognition for themselves without the PO backing them.<sup>145</sup> Because some, like Tfue, have crossed the line and live in both worlds, there is a subset of professional gamers that can rightfully be considered some sort of hybrid Athlete-Streamer.<sup>146</sup>

The case of the hybrid Athlete-Streamer, such as Tfue, presents its own set of issues in separating the artist from the athlete in order to determine the applicable law. The lines may become blurred, for example, where things like endorsement deals come into play—are they solely for the team as a professional athlete, or are they for the alleged artist, namely, Tfue? The reason the distinction between gamers who are pure Athletes and gamers who are Streamers or hybrid Athlete-Streamers is so pivotal is that the TAA might not apply to those gamers who are pure esports Athletes.<sup>147</sup> There is some debate, outside the scope of this Note, as to whether esports athletes are actually athletes; there is some authority suggesting that, at least in the United States, esports athletes are considered actual athletes considering the fact that the United States has granted P-1A visas, which are also known as the “athlete” visas, to some international professional gamers before.<sup>148</sup> Assuming they are legally considered athletes, pure esports Athletes would be subject to a separate set of athlete-specific laws governing Athlete agents, which vary depending on the states and countries in which they compete.<sup>149</sup> Where the TAA covers artists, their contributions in entertainment, and those who procure work for them in California, athletes are subject to a different set of regulations, unless, of course, they cross over into the

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145. *Id.*

146. *See generally id.* (explaining that in gaming it is the status quo for esports athletes to blend their careers as streamers); *see also Tfue—Results by Highest Prize Won*, ESPORTS EARNINGS, <https://www.esportsearnings.com/players/38125-tfue-turner-tenney/results-by-prize> (last visited Apr. 11, 2021) (stating that Tfue, a professional streamer, has won hundreds of thousands as a competitive esports Athlete playing Fortnite).

147. *See* CAL. LAB. CODE § 1700 *et seq.* (West, Westlaw through Ch. 9 of 2021 Reg. Sess.). The TAA only applies to “artists” and people who procure artistic employment for artists.

148. These are evaluated on a case-by-case basis and also often denied for esports athletes. *See* Jonathan Brannon, *Are You Not Entertained? Considering the P-3 Visa as an Alternative Option for International Esports Professional Gamers*, 60 ARIZ. L. REV. 753, 754 (2018).

149. In California, section 18895 *et seq.* of the Business and Professions Code, also known as the Miller-Ayala Athlete Agents Act, regulates the procurement of work for professional athletes, and has some basic similarities to the TAA. *See* CAL. BUS. & PROF. CODE §§ 18895 *et seq.* (West, Westlaw through Ch. 9 of 2021 Reg. Sess.).

entertainment space as artists as well.<sup>150</sup> As discussed below, POs will want to carefully consider how to approach and delineate their services so as not to offend the TAA.

Considering the instability professional gamers who create content for online streaming face, and the contrasting general stability and recognition that a powerful brand name can give to an otherwise lesser-known gamer, the fact that a popular entertainer might want to join forces with a popular esports organization, and the organization in turn embraces the entertainer, seems unsurprising. Such a mutually beneficial relationship seems obvious, even. But this also might create the set of circumstances that would entice a young, rising star seeking an instant popularity boost to accept less than favorable terms to join an established and popular organization, much like in Tfue's case with FaZe Clan.

*b. The Lawsuit: Unforeseen Consequences of a Hopeful Signing*

Tfue's promising relationship with FaZe Clan was relatively short-lived at just over a year.<sup>151</sup> As Tfue skyrocketed in popularity, the realities of his contract with FaZe Clan became clear: he was contractually obliged to surrender a disproportionate share of his earnings and a significant level of control to a PO in exchange for the clout of FaZe Clan and its services.<sup>152</sup>

Tfue's contract, titled "Gamer Agreement," provides that in exchange for "compensation," Tfue will: (1) play on FaZe Clan's professional Fortnite team, in tournaments, training sessions, events hosted by FaZe Clan; (2) provide publicity and promotional services, including content creation (streaming) capped at 24 hours per month; (3) participate in marketing for FaZe Clan, its sponsors, and brands "as requested by [the c]ompany"; (4) represent FaZe Clan's sponsors and partners, including wearing FaZe Clan and its sponsors' merchandise in public places, social media, or otherwise as "reasonably requested"; (5) represent FaZe Clan in social media "as instructed by [FaZe Clan]"; (6) participate in training sessions; and (7)

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150. See Determination of Controversy at 8, *Leonard v. Rebney*, No. TAC-23-04 (Cal. Lab. Comm'r July 1, 2005) (famous boxer Ray Leonard was an "artist" under the TAA for his host position on *The Contender*).

151. Tfue's deal with FaZe was announced on April 30, 2018; the lawsuit was filed just over a year later, on May 20, 2019. See Complaint, *supra* note 16.

152. See *id.* at 3-4.

participate in all LAN tournaments, major tournaments, League matches, and online tournaments as requested by FaZe Clan.<sup>153</sup>

In exchange for these services, FaZe Clan promised Tfue a salary of \$2,000 per month, subject to a 25% increase or decrease at FaZe Clan's sole discretion after each six-month period.<sup>154</sup> On top of this, FaZe Clan and Tfue were to split the revenues Tfue earned as follows: (1) cash prizes and tournament winnings split 80% to Tfue and 20% to FaZe Clan; (2) in-game purchases split 50% to each; (3) personally branded Tfue merchandise and apparel to "be negotiated separately"; (4) brand deals with Tfue on either FaZe Clan's or Tfue's personal "content creation platforms (e.g. Twitch/YouTube)" split at 50% to each *if Tfue brings the deal in himself*; (5) brand deals with Tfue on either FaZe Clan's or Tfue's personal "content creation platforms (e.g. Twitch/YouTube)" split at 80% to FaZe Clan and 20% to Tfue *if FaZe Clan brings the deal to Tfue*; (6) any team merchandise or apparel featuring Tfue's likeness, unrelated to FaZe Clan merchandise and apparel, manufactured by or in conjunction with FaZe Clan split at 80% to FaZe Clan and 20% to Tfue; and (7) 50% each for Tfue's appearances, touring, sign-up bonuses, and "similar activities and sources."<sup>155</sup>

Interestingly, the contract also dictates that all payments be paid directly to FaZe Clan, who will then remit Tfue his share monthly within thirty days of each month's end, unless prize money exceeded \$5,000, in which case it would be paid within thirty days of receipt by FaZe Clan regardless of when received.<sup>156</sup> This is not unlike a typical talent agency.<sup>157</sup> In fact, the TAA provides guidelines for an agency receiving funds on behalf of the client: they must be deposited in a trust fund account and remitted, less commission, within 30 days of receipt.<sup>158</sup> However, unlike Tfue's contract with FaZe Clan, the market commission charged by conventional talent agencies is

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153. GAMER AGREEMENT 1-2 (Apr. 27, 2018), [https://web.archive.org/web/20210209130645/https://theblast.com/wp-content/uploads/2019/05/0522\\_Gamer\\_Agreement\\_Tfue\\_2.pdf](https://web.archive.org/web/20210209130645/https://theblast.com/wp-content/uploads/2019/05/0522_Gamer_Agreement_Tfue_2.pdf).

154. *Id.* at 2.

155. *Id.* at 2-3.

156. *Id.* at 3.

157. *See, e.g., How to Pay Your Agent*, BACKSTAGE (June 15, 2015, 6:00 PM), <https://www.backstage.com/magazine/article/pay-agent-8943/> (describing how artist checks are sent directly to the agency, who then puts them in a client trust account before deducting commission and sending the remainder to the artist).

158. CAL. LAB. CODE § 1700.25 (West, Westlaw through Ch. 9 of 2021 Reg. Sess.).

generally capped by union agreements—SAG-AFTRA, for example, sets a maximum 10% commission, dependent on the type of deal procured—as contrasted to the varying and seemingly quite high rates charged by FaZe Clan.<sup>159</sup>

Further still, the contract’s Terms and Conditions contain an exclusivity provision that requires not only that all sponsorship and endorsement opportunities be expressly approved by FaZe Clan, but also that FaZe Clan is “entitled to negotiate the terms and conditions of any such opportunities presented to” Tfue and that FaZe Clan “will also work to source sponsorship and/or endorsement opportunities on behalf of” Tfue.<sup>160</sup> This exclusivity grants FaZe Clan the right of approval over any third-party requests for Tfue’s services, along with a matching right against any future offers Tfue might receive from other POs.<sup>161</sup> These restrictive clauses, along with the allegedly extremely high fee rates imposed by FaZe Clan, make up the central issue at the heart of Tfue’s complaint.

Tfue’s complaint paints the typical player-signee such as himself as young, unsophisticated, and trusting.<sup>162</sup> Tfue highlights the fact that esports revenue is driven significantly by the creative efforts of professional gamers, and that “[b]ecause the esports industry is so new, there is little to no regulation or oversight.”<sup>163</sup> Meanwhile, Tfue paints FaZe Clan as opportunistic and “grossly oppressive” for pushing such one-sided and restrictive contractual terms on Tfue.<sup>164</sup> Tfue alleges that FaZe Clan subscribes to the contractual business-model imposed on Tfue with all of its signings generally in an attempt to “‘own’ [Tfue] and other content creator/streamers and professional gamers.”<sup>165</sup> Arguing that the contract is illegal and anti-competitive, Tfue especially focuses on the fact that he is contractually obliged to surrender up to 80% of his earnings in some circumstances, and, importantly, that “FaZe Clan continuously and systematically

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159. See *Frequently Asked Questions: Agency Representation*, SAG-AFTRA, <https://www.sagaftra.org/contracts-industry-resources/agents-managers/frequently-asked-questions> (last visited Apr. 11, 2021) (under “When and how much should I pay my agent?”).

160. GAMER AGREEMENT, *supra* note 153, at 8.

161. *Id.*

162. See Complaint, *supra* note 16.

163. *Id.* at 2.

164. See *id.* at 2–3.

165. *Id.*

procures and attempts to procure employment and engagements for [Tfue] as an artist in violation of” the TAA.<sup>166</sup>

Before settling the suit, Tfue’s complaint was dismissed in California, largely due to the fact that the contract had a forum selection clause granting exclusive jurisdiction over contractual disagreements to courts of New York; in so ruling, however, Tfue’s petition before the CLC remained active because the CLC “has exclusive jurisdiction over the question of whether the TAA applies.”<sup>167</sup> Judge Patricia Nieto described the TAA as “unwaivable,” and held that the “TAA was created for a public purpose, and [Tfue] therefore cannot waive these rights through the forum selection clause.”<sup>168</sup> Unfortunately, due to the subsequent settlement, the CLC still has yet to weigh in on the ultimate status of gamers as artists.

Tfue’s Petition to the CLC (the “Petition”) describes the allegedly illegal and unlicensed agency relationship as one in which “FaZe Clan secures the purported right to procure employment or engagements” for Tfue and thus that “FaZe Clan’s primary and essential function is to promote and sell [Tfue]’s artistic services and procure sponsorship deals which feature those services.”<sup>169</sup> Thereafter, FaZe Clan “retains a grossly unconscionable commission for sourcing the deal.”<sup>170</sup> Tfue’s petition describes Tfue’s multifaceted revenue sources, such as promotions on Twitch, YouTube, and Instagram.<sup>171</sup> Tfue alleges that FaZe Clan “actively participated in the procurement and negotiation of sponsorship deals which included [Tfue]’s services as an artist,” specifically meaning that Tfue would perform in videos for sponsors, such as “a video for sponsor Digital Storm promoting Digital Storm’s products that garnered over 19 million views.”<sup>172</sup> FaZe Clan also allegedly procured “modeling engagements” where Tfue would “model apparel and jewelry for certain sponsors.”<sup>173</sup>

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166. *Id.* at 3.

167. Bill Chang, *The FaZe Clan v. Tfue Case Continues*, GAME CHANGERS (June 24, 2020), <https://www.gamechangerslaw.com/blog/ufppfr7w8cyrnv5y1vfiy5lmp2i22>.

168. Patrick Shanley, *Esports Star Tfue’s California Fight with FaZe Clan Paused by Judge*, HOLLYWOOD REP. (Dec. 6, 2019, 10:20 AM), <https://www.hollywoodreporter.com/news/esports-star-tfues-california-fight-faze-clan-paused-by-judge-1259879>.

169. Complaint, *supra* note 16, at 3 n.2.

170. *Id.*

171. *Id.* at 2–3.

172. *Id.* at 4.

173. *Id.*

Tfue further alleges that, in violation of the TAA’s prohibition against sending an artist to unsafe places and other safety-related provisions,<sup>174</sup> FaZe Clan “pressured” Tfue to move to Los Angeles and “to live in one of FaZe Clan’s homes,” where, before Tfue turned twenty-one, parties were “fueled by alcohol” and FaZe Clan encouraged illicit gambling.<sup>175</sup> FaZe Clan also allegedly encouraged Tfue to undertake dangerous stunts in videos, and in one such stunt he injured his arm while skateboarding, suffering permanent disfigurement.<sup>176</sup> If true, the outlook would be troubling for FaZe Clan.

*c. The Act Protects: Professional Gamers Like Tfue Qualify for Protection as Artists under the TAA from Unlicensed Esports Organizations Acting as Talent Agencies*

Until legislation is enacted that specifically addresses esports and the unique challenges professional gamers face, thereby balancing the previously examined power disparity, the TAA may provide an initial line of defense in California for young and hopeful content creators hoping to sign with an established PO. This is rooted in the recognition that many professional gamers should qualify as artists under the TAA. Thus, the procurement of employment for these artists in California without a proper talent agency license should render contracts between POs and their talent “illegal and void ab initio.”<sup>177</sup> POs will want to carefully consider: the type of gamer they are signing; the contractual obligations they sign them to; the services they offer the gamer; and whether or not they are willing to risk voided contracts and, consequently, forfeited cash.

As an initial matter, given the CLC’s consistently broad reading of the TAA and the types of persons who qualify as artists historically,<sup>178</sup> it is a logical conclusion to consider professional Streamers, who spend thousands of hours creating content for their

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174. CAL. LAB. CODE §§ 1700.33–.35 (West, Westlaw through Ch. 9 of 2021 Reg. Sess.).

175. Petition to Determine Controversy at 4, *Tenney v. FaZe Clan Inc.*, No. 52704 (Cal. Lab. Comm’r May 15, 2019).

176. *Id.* at 5.

177. *Styne v. Stevens*, 26 P.3d 343, 346 (Cal. 2001).

178. Recall, for example, the finding that hosting *The Contender* rendered boxer Ray Leonard an “artist” in the eyes of the CLC (*Leonard v. Rebney*, No. TAC-23-04 (Cal. Lab. Comm’r July 1, 2005)), and that “Dog” the bounty hunter qualified as well (*Chapman v. Krutonog*, No. TAC 3351 (Cal. Lab. Comm’r Oct. 31, 2012)).

fans to “boost ratings” and promote their on-stream personas,<sup>179</sup> as artists. While the extent of a professional gamer’s rights to their created content is limited at best due to the inevitable nature of game streams as derivative works on the Publisher’s copyrighted games,<sup>180</sup> there is little doubt that these contributions are the works of artists, at the very least under the broad definition granted by the TAA.<sup>181</sup>

Using Tfue as an example, the hybrid Streamer-Athlete presents another wrinkle, because separating the Athlete from the Artist may prove challenging when so much of their dual professional lives intertwine. But should this even matter? As *Leonard v. Rebney* held, a celebrity’s status as an athlete is irrelevant when that celebrity takes on the role of an artist, because the TAA was meant to “protect artists in their capacities as artists, and to regulate persons who procure artistic employment for artists.”<sup>182</sup> Thus, to the extent that FaZe Clan used Tfue’s fame and personality to promote partners’ products and promote the FaZe Clan brand, procured sponsorship deals for Tfue, and otherwise negotiated and represented Tfue in his artistic business deals, FaZe Clan acted as Tfue’s talent agency. Without proper licensure, FaZe Clan was acting illegally in California.

While Tfue streaming on FaZe Clan’s channels could have been subject to a valid contractual employment agreement between private parties and competing in tournaments as a FaZe Clan teammate was ostensibly a valid contractual athlete agreement, FaZe Clan chose to subject Tfue to all his contractual agreements under one transaction. Thus, if Tfue’s allegations had proven true in hearings before the CLC, the CLC likely would have voided Tfue’s contract with FaZe Clan in its entirety and ordered FaZe Clan to remit any revenue earned by Tfue under contract in full to Tfue.<sup>183</sup> The central purpose of the contract

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179. See *Leonard v. Rebney*, No. TAC-23-04 (Cal. Lab. Comm’r July 1, 2005). While the author does not promote a “sweat of the brow” approach to for defining an artist, the overall entertainment factor, as it pertains to promotional value, is something the CLC considers in determining whether someone is an artist.

180. See *Copyright in Esports*, *supra* note 25.

181. CAL. LAB. CODE § 1700.4 (West, Westlaw through Ch. 9 of 2021 Reg. Sess.).

182. See *Leonard v. Rebney*, No. TAC-23-04 at 9 (Cal. Lab. Comm’r July 1, 2005) (emphasis added).

183. Recall that while the doctrine of severability theoretically could apply, the decision to sever illegal portions of a contract is solely within the CLC’s discretion; historically, this means voiding the entire contract unless the procured employment is “collateral to the main objective of the contract.” See *Yoakam v. The Fitzgerald Hartley Co.*, No. TAC 8744 at 21 (Cal. Lab. Comm’r Jan. 9, 2009); *Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 754 (Cal. 2008).

was arguably procuring employment for Tfue in exchange for massive commissions. Apart from competitive tournaments, the focus of Tfue's contractual duties significantly revolves around promotion, brand deals, streaming, merchandising, and touring.<sup>184</sup> It seems that Tfue's competitive prowess may have been ancillary to his ability to drive promotional and marketing revenue for FaZe Clan and its sponsors. Further, even if the CLC found the procurement of employment to be entirely collateral to the purpose of the contract,<sup>185</sup> FaZe Clan would still be subject to a void contract and would have to surrender any commissions that were the result of illegally procured employment for Tfue. While FaZe Clan asserted it only actually took \$60,000 from Tfue's services, Tfue vehemently disputed this and ultimately the truth would have been ascertained in discovery during the course of the now-settled litigation.<sup>186</sup> Either way, at a minimum, \$60,000 was at stake for FaZe Clan.

FaZe Clan undoubtedly brought value to Tfue, and based on the popularity of the organization, it also brings significant value to the esports industry as a whole.<sup>187</sup> In order to protect the legitimate value of the business, FaZe Clan and other POs like it should consider taking steps to position themselves to continue creating value for their gamers and their organizations. Unless specific legislation is enacted for esports that removes gamers from the "artist" pool, POs will have to comply with the dictates of the TAA if they want to continue procuring work for their artist-gamers in an agency-like capacity. This means, first, applying for and obtaining a talent agency license from the office of the CLC under Article 2 of the TAA.<sup>188</sup> POs like FaZe Clan should consider segregating the business to clearly delineate the pure esports business from a properly licensed "agency" arm, which will procure work in sponsorships, streaming, apparel, modeling, and other "artistic" functions of their talent. Thus, they could also consider having separate Athlete and Artist contracts for their gamers such that

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184. See *Gamer Agreement*, *supra* note 153, at 2.

185. See *Yoakam v. The Fitzgerald Hartley Co.*, No. TAC 8744 (Cal. Lab. Comm'r Jan. 9, 2009).

186. See, e.g., Ben Walker, *Tfue's Lawyer Says that FaZe Clan Taking Only \$60,000 Is "a Complete Fiction,"* DOT ESPORTS (June 15, 2019, 10:04 AM), <https://dotesports.com/business/news/tfues-lawyer-says-that-faze-clan-taking-only-60k-is-a-complete-fiction>.

187. See, e.g., Tfue, *supra* note 29; Khal, *supra* note 95.

188. CAL. LAB. CODE §§ 1700.5--22 (West, Westlaw through Ch. 9 of 2021 Reg. Sess.).

in the event of any violations of the TAA, the Athlete-only contract is safely separated from the CLC's TAA purview.

Separating the business clearly into both an esports Athlete and esports Artist operation would also help them to better formulate contracts with transparency and ensure they are not at risk of eschewing the legal framework of the TAA. Because every Artist's contract must be submitted to the CLC for approval, it is entirely possible that the commissions charged in a contract like Tfue and FaZe Clan's would have to be lower to gain approval.<sup>189</sup> This further highlights the need for unionization of professional gamers where, subject to collective bargaining agreements, caps and floors can be set for commission rates not unlike collective bargaining agreements in traditional entertainment and sports.<sup>190</sup> In reality, POs are not the esports villain, but where sudden fame results in big business placed in the hands of inexperienced stars, some short-sighted decisions have jeopardized otherwise legitimately valuable operations.

A brief note—pure esports Athletes are out of luck as pertains to the TAA. As discussed earlier, the TAA only protects artists. So, unless their teams procure artistic employment for them, such as promoting a sponsor's product in a commercial,<sup>191</sup> Athletes will have to rely on athlete-specific legal frameworks until the federal or state legislatures adopt esports-specific legislation. Thus, esports Athletes should carefully consider contracts they sign with their teams and are encouraged to retain counsel when negotiating their contracts to avoid a Tfue-like situation.

Not only does the case of Tfue and FaZe Clan highlight the need for an esports players' association to solidify proper guidelines for

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189. *See id.* § 1700.23. While the commission rates might be lower, POs at least would no longer risk losing them altogether.

190. For example, SAG-AFTRA requires that any union member who engages the services of an agent uses a "franchised agent," which is one who agrees to abide by certain SAG-AFTRA rules, including commission capped at 10%. *See Frequently Asked Questions, supra* note 158.

191. Note, however, that using recordings of their competitive performances in tournaments may be fair game. *See* NAT'L BASKETBALL PLAYERS ASS'N, NBA COLLECTIVE BARGAINING AGREEMENT 221–22 (2017), <https://athawksfanatic.github.io/NBA-CBA/nba-cba-2017.pdf> (under the Unauthorized Endorsements/Sponsor Promotion section, "it shall not be an Endorsement for the NBA, a League-related entity or an NBA Team to use, or authorize others to use, including, without limitation, in third party advertising and promotional materials, footage and photographs of a player's participation in NBA games or other NBA events that do not unduly focus on, feature, or highlight, such player in a manner that leads the reasonable consumer to believe that such player is a spokesman for, or promoter of, a third-party commercial product or service").

POs signing young stars, but it also spotlights the need for federal and state legislatures to duly enact esports-specific legislation. Specifically, the legislation should protect professional gamers similarly to the way the TAA protects “traditional” artists but recognize the unique and dynamic business that esports encompasses.<sup>192</sup> Using the TAA as a paradigm, an esports-specific regulatory scheme can bypass the “athlete or artist” question entirely and properly protect the biggest and smallest stars in a currently unregulated billion dollar industry.<sup>193</sup>

#### IV. CONCLUSION

Where a multifaceted contract purports to control things such as a Streamer’s right to their own created content, their sponsorship deals, team and tournament competitions, merchandising, and more, the benefit of sound advice from legal counsel and proper negotiations could save someone like Tfue the trouble of suing an organization like FaZe Clan. Still, FaZe Clan made its own mistake when it ignored the TAA; a contract on more favorable terms to Tfue, but with the same general obligations, still could have been subject to the CLC’s wrath. Tfue’s complaint summarizes the crux of the issue:

Until now, Faze Clan has enjoyed the fruits of this illegal business model with impunity because no-one could or was willing to stand up to Faze Clan. Those days are over. Through this action, [Tfue] seeks to shift the balance of power to the gamers and content creators/streamers, those who are actually creating value and driving the industry. As a result of this action, others will hopefully take notice of what is going on and help to clean up esports.<sup>194</sup>

Others certainly have taken notice, and even though Tfue and FaZe Clan have managed to peaceably settle the litigation on undisclosed terms, the impetus for change in esports called for in the

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192. See, e.g., Chao, *supra* note 56 at 763 (calling for federal regulation that “promotes basic gaming rights and ethics—like protection for minors and player employees—and also supports the legitimacy of a domestic esports association”).

193. See James Ayles, *Global Esports Revenue Reaches More than \$1 Billion as Audience Figures Exceed 433 Million*, FORBES (Dec. 3, 2019, 6:36 PM), <https://www.forbes.com/sites/jamesayles/2019/12/03/global-esports-revenue-reaches-more-than-1-billion-as-audience-figures-exceed-433-million/>.

194. Complaint, *supra* note 16, at 4.

lawsuit cannot be ignored. Organizations like FaZe Clan have apparently benefitted from a largely unregulated “wild west”<sup>195</sup> by leveraging their superior bargaining position to sign gamers like Tfue to profitable contracts that, ultimately, are illegal. Without proper licensure, FaZe Clan and other POs cannot legally procure employment in California for their artists without risking losing the talent, and the money they bring, entirely. While POs unquestionably bring significant value to the professional gamers on their roster and the esports industry as a whole, they should more carefully structure their business and their contracts to ensure they do not run afoul of the protective veil of the TAA. Further, federal and state legislatures ought to recognize esports as an industry in dire need of regulation and act accordingly. Professional gamers who act as Streamers and hybrid Athlete-Streamers are artists subject to the TAA’s protection. Thus, as the business of esports has risen into legitimacy, the forces that control these professional gamers’ lives and careers from within the industry must follow suit.

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195. The characterization of the esports industry as a new form of the “wild west” is not uncommon. *See, e.g.*, Graham Ashton, *Governing the Wild West—An Introduction to Esports Federations and Associations*, ESPORTS OBSERVER (Jan. 3, 2019), <https://esportsobserver.com/esports-federations-intro/>.